DID THE COMMON LAW BIAS THE ECONOMICS OF CONTRACT... AND MAY IT CHANGE?*

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INTRODUCTION: THE RAISE OF THE ECONOMICS OF CONTRACT

Over the last 25 years, the notion of contracts has become essential in economics. Indeed, by focussing on contractual relationships researchers have become able to analyze more effectively the features of decentralized economies. Previously the sole available concept was the walrasian market that is quite irrelevant in many situations, despite its strength. As is now well known, the notion of centralized markets without transaction costs is inappropriate for the analysis of many bilateral situations (such as R&D alliances, sub-contracting or distribution channels, etc.) and even market equilibria. (Markets are out of equilibrium, or reach only second best equilibria when information asymmetries and transaction costs are taken into account: see, for example, the developments of New-Keynesian economics reported by Mankiv, 1990 or Romer, 1991). This new concept has led to the development of several theoretical frameworks — particularly the Incentives Theory (IT), the Incomplete Contract Theory (ICT) and Transaction Cost Economics (TCE) — that are essential today in the updating of many theoretical and applied analyses (see Brousseau & Glachant 2000).

These developments in the economics of contracts have had a marked influence in Law and Economics thinking, especially in the US. Regulatory and antitrust legislation had been primarily concerned with the earlier development of the economics of contracts: as to whether franchising public utilities or specific vertical contractual arrangements could be considered efficient, or second-best solutions to coordination problems (see Williamson 1985, OCDE 1994, Joskow 2000). But as shown in the New Palgrave of Economics and the Law (Newman 1998) or in the Encyclopaedia of Law and Economics (Bouckaert & De Geest 1999), economic thinking has latterly also strongly influenced the more detailed regulation of contract: default rules, contract breach and remedies, contract interpretation, etc. More precisely, economic analysis has enabled researchers to systematically analyze the consequences (especially in terms of incentives) of alternative contractual practices and regulations, and to evaluate the conditions in which some rules are more efficient than others. As is usual in Law and Economics, economic reasoning can be contradicted because it often relies on very restrictive assumptions, and because it does not take into account all issues of a social nature. (Clearly efficiency should not be the sole criteria of Law design !). Nevertheless, it is
 undeniable that economic reasoning has enabled a more systematic analysis of the consequences of alternative contractual regulations.

Conversely, legal thought has substantially influenced economic analysis of contracts. Researchers such as Schwartz, Goldberg and Macneil are often quoted in economic papers either in support of certain assumptions or to establish a parallel between results drawn from economics and those resulting from legal reasoning. In some instances, legal thinking has strongly influenced economic concepts.

By contrast, in Civil Law Countries, and especially France, the economics of contracts can be considered as totally separate from the legal doctrine of contracts. French researchers specializing in the economics of contracts seem to be influenced primarily by theories that have been developed in the US. Evidently economic theory is dynamic and is not restricted either historically or nationally: economists develop theories aimed at describing universal phenomena. However, when it comes to notions deeply grounded in an institutional framework together with its legal system, historical and national aspects have a marked effect. For instance the concepts relevant for a US lawyer — bilateral contract vs. unilateral contract, express contract, implied contract — are quite different from those prevalent in Roman-Germanic law — commutative contracts, contracts with or without payment, etc.—. More generally, the structure of legal thought is quite different on both sides of the Atlantic Ocean (and even of the Channel). European economists working on contracts most usually invoke US legal concepts when they refer to actual contracts or legal notions. This explains why legal researchers in Civil Law do not incorporate economic reasoning when they are working on contracts, and why the large body of legal doctrines relating to contracts in Civil Law countries do not make reference to economics. This arises partly because most of these legal doctrines are much older than contract theories and even economics, and also because many European Law researchers do not understand how contractual issues are addressed by economic thought. The concepts and issues on which they focus are quite different from those of economists. This may also be added that in the French institutional framework, historical and organizational features make for a clear separation between legal and economic researchers. This organization obviously favors mutual misunderstanding.

Whatever the causes, it is evident that in Civil Law countries, and especially in France, cross-fertilization of legal and economic thought does not really exist in respect of contracts. The aim of this paper is to query this situation. More precisely, I would like to address the relevance and the utility of dialogue between the two disciplines. Are the economics of contracts compatible with the development of Civil Law doctrine? Can the Civil Law doctrine enrich the economics of contracts?

To answer these questions, I will first consider how the US legal framework influences the economic reasoning on contracts. This will enable me to demonstrate how the economics of contracts could assist in the development of legal doctrines. I will then suggest how Civil Law doctrine could enrich the economics of contracts.

Two basic arguments will therefore be developed through this paper. First, in a quasi-Veblenian spirit, I will argue that economic thinking relating to contracts and to institutions depend inherently on the legal systems theoreticians have in mind. Indeed legal doctrine and the features of the institutional environment deeply impact on contracting practices, and even on the “spirit” of contractual commitments, because to be valid and enforceable, contracts must necessarily correspond to the institutional environment to which they refer. For various reasons, the present economics of contracts is deeply rooted in the US legal framework. Second, I will argue that despite this situation cross-fertilization is possible between US-centric economics of contracts and Civil Law doctrine. Indeed, the two systems generate general analytical categories and normative criteria (efficiency, equity, etc.) that are relevant for analysis and comparison of the two legal structures. Moreover, due to the globalization of world economies, there is increasing hybridization and competition between legal systems, raising questions of compatibilities and cross-fertilization among the various legal systems and their practice.
HOW ACTUAL INSTITUTIONS INFLUENCE ECONOMICS

To better understand how economic reasoning on contracts could enrich legal doctrines in Civil Law countries, and vice-versa, it is essential to recognize the strong influence of the US legal framework on the economics of contracts. Three examples will enable a better understanding of how researchers are influenced by their individual legal institutions. This is not surprising, but there are consequences even on the very abstract concepts economics is dealing with. Economic reasoning has been strongly influenced in the US context by problems relating to contract design and enforcement. We will thus indicate that the questions raised by Civil Law doctrine are slightly different from the major issues addressed by the economics of contracts. This will lead us to show that contracts under US legislation have a quite different status from those under Continental legal doctrines.

Three Examples of the Influence of Common Law on the Economics of Contracts

The first example shows how economics in general, and the incentive theory in particular, consider contracts. In the language of the economist, a contract is a bilateral agreement aimed at organizing a transaction by designating mutual obligations for both parties without constraints. A "standard" contract for the economist is a complete contract concluded between two parties, which is enforceable by a third party, acting in the capacity of a benevolent and neutral arbitrator. The role of the third party is neither to determine that the contract is in conformity with the legal framework, nor to interpret the ambiguities in the contract, but to oblige the parties to behave according to their commitments. Clearly this simplified description of a contract can be refined: the third party can be considered as non-benevolent; his ability to supervise (verify) can be considered limited; etc. Nevertheless, the contract of reference in economics is a complete contract concluded without any constraint by two parties and guaranteed by a third party. The contract is so perfect and so neutral that the two parties never need recourse to the third party. Since the contract is complete and since the third party guarantees that its wording will be scrupulously applied, both parties are incited to perform it. In that sense, the contract is both the unique means of co-ordination and the means to completely solve co-ordination problems.

Obviously, this modelization of a contract is far removed from actual contractual practice under US or British law. It is for instance obvious that judges have to interpret contracts in Common Law countries. Most of the Law and Economics debates related to contracts consider the approach of judges to the interpretation of the real intent of the contracting parties. However, our argument is that this simplified description of contract is closer to the concept of contract under Common Law, especially US Law, than the Roman-Germanic view of contracts. In Civil Law countries, contracting is performed under the Law. The Law is considered as the principal means of inter-individual co-ordination: contracts are tools enabling parties to complete the general rules in order to customize co-ordination rules to their specific situations. In Common Law countries, co-ordination is based on bilateral agreement with the Law acting simply as a means to facilitate contract settlement or to set aside excess negative externalities of private practice. In a sense the stock phrase: "In US Law whatever is not forbidden is authorized, while in French Law whatever is not explicitly authorized must be considered forbidden" reflects appositely the present state of contractual practices within the two legal frameworks. Freedom of contracting is recognized on the two shores of the Atlantic, but in continental Europe there are significant constraints under codified law in comparison with the US.

In the same vein, it is to be noted that a contract is by definition bilateral and reciprocal in economics (in the sense that it states bilateral obligations). This is true under US Law, but it is quite different in
French Law. In the French system, a contract can be unilateral. In the US, contracts refer to a specific type of Civil Code contracts: synallagmatic contracts (contrats synallagmatiques). Additionally, in the US contracts also refer to a specific category of French contract: the "contrat d'adhésion". Under US legislation a contract results from a proposition made by one party that is accepted or rejected by the other. In the French system this "take-it-or-leave-it" method of concluding a contract is a specific type and refers to the notion of "joining" contract. Under French Law there is no distinction between the offeror and the offeree, whereas in economics as in US Law there is a party — the "principal" — who proposes various contractual schemes to the other — the "agent". The focus of economics on a specific type of contract is not surprising since commercial transactions are generally the center of interest, and also the essential aim of economists was not (initially) to study in depth the economics of contractual practices, but the features of a decentralized market economy. This bias needs to be borne in mind.

The second example of the institutional influence on the economics of contracts can be found in Incomplete Contract literature. This literature is organized around confrontations and recombination between two basic models developed by Hart and Moore (1988) and Aghion, Dewatripont, and Rey (1994) (quoted as H&M and ADR). The central issue addressed by the theory is the design of an optimal contract when it is impossible to make enforceable ex-post a commitment in respect of a variable that is essential for successful completion of the transaction, because that variable, for instance a specific investment, is not verifiable by a third party (see further in the next section, p. 19). Such a contract should implement a default option and a renegotiation mechanism. The default option states the minimum conditions of exchange aimed at inciting one of the parties to behave (invest) optimally, because the option guarantees a desirable return on the investment. The renegotiation provision enables the second party — who is not protected by the default option — to adapt the conditions of exchange to the ex-post situation. There is necessarily a period between the date of commitment and the date of exchange. During this period, the circumstances of the parties may change, with the evolution of the situation. Ex-post, with a review of the situation and the investments of the parties, the optimal conditions of exchange — i.e. the price and the quantity that generate the largest collective surplus — may be different from those stated in the default option. By allocating the right to decide what should be the ex-post conditions of exchange to the second party, an incomplete contract implements incentives inducing this party to behave (invest) optimally, since he will be able to receive a surplus generated ex-post and therefore make a return on initial investment.

The main difference between H&M and ADR is in the enforceable default option. For us, it is strongly linked to the assumptions of the authors as to the behavior of judges and courts. Hart and Moore have in mind the American legal system in which extended renegotiations of contract provisions is considered a factor of efficiency. In US law, the present will of contractors is preferable to the past, because if the parties reach a new agreement it takes into account the evolution of the mutual situation, and therefore guarantees an outcome superior to any previous mutual commitment. On the other hand, it seems that ADR have in mind the French legal system. While this is a simplification (since there are many exceptions), French courts are more reluctant than US ones to authorize contracting parties to renegotiate their commitments. They more systematically apply specific performance principles (exécution en nature), that oblige the parties to observe their initial contractual commitments (even if both parties were to agree to renegotiate). Under Civil Law doctrine, such a principle is a good guarantor of the fairness of the agreement. It is implicitly recognized that a contract creates some irreversibilities that one of the parties could try to exploit ex post, to gain an unfair advantage in renegotiating the contract. Whatever the reasons, by forbidding ex-post renegotiations and by obliging observation of the initial contract, French courts substantially increase the credibility of contractual commitments. Parties can safely consider ex-ante commitments as secure, therefore the agreement provides them with the incentive to optimally invest ex-ante, even though the ex-post lack of flexibility can generate sub-optimal ex post level of exchange in a changed situation. The US flexibility is an effective method of optimally adapting agreements to ex-post conditions. However, since any component of the agreement can be ex-post renegotiated, the parties will not take the initial commitments for granted, and they will ex-ante limit
their implication in the cooperative process. To sum up, the H&M vs. ADR types of contract seem to reflect the differences between the US and the French legal systems. Obviously, neither of the two models is aimed at describing a specific legal framework, but even unintentionally they do so.

The third example of the influence of the US legal framework on the economics of contract can be provided by the Transaction Costs Theory (TCT). In his analysis of incomplete contracts, Williamson (1991, 1996), is very much influenced by Macneil's analysis of relational (or neoclassical) contracting that draws directly from an analysis of US legal practices (Macneil 1974). Macneil’s main conclusion is that incomplete contracts are less costly and more robust than complete contracts (in certain circumstances). Incompleteness enables contractors to economize on ex-ante negotiation and contract design costs. It also reinforces the credibility of commitments since commitments can be adapted to many contingencies arising ex-post but unforeseen ex-ante. This flexibility of commitments prevents the parties to breach them, because they know that they will be able to find compromises that will take into account both parties' interest. While it has to be taken into account that the analyses of Macneil and Williamson are not recognized by all American Law researchers and practitioners, it is clear that US case-law recognizes the efficiency and at least the legality of incomplete contracting. This is quite different from French doctrine. Until the mid 1980's, incomplete contracts were considered as legally void. This was for instance the case for a long term distribution contract in which prices were not fixed and for which one of the parties (the supplier) had a unilateral right of decision over the mutually agreed price. Even today, contracts in which unilateral rights of decision are implemented are considered with suspicion by the doctrine and by practitioners.

While these three examples clearly point out that the US legal practices have a marked influence on economic thinking as concerns contracts, they do not prove at all that economic concepts are irremediably biased, nor can it be reasoned from these examples that economics has no application in the analysis of French law. What does emerge is that the issues and their causes addressed by economic thinking on contractual practice are principally based on US legal practice.

**Equity and Contract Formation at the Heart of Civil Law Reasoning**

To go further, it is interesting to note that the questions raised by French legal thought on contracts are quite different from those that are crucial in the Common Law framework. Textbook and doctrinal debates are concentrated in Civil Law countries, and at least in France, on two central issues: Contract formation and Equity (see, for instance, Malinvaud 1992). Both relate obviously to building guidelines for the judiciary system for contract interpretation and translation into judgements where conflicts occur. In fact, the main point is not to interpret the contract because contracts are supposed to be quite complete (see above and note 2) in the sense that they must set down detailed conditions when general default rules do not apply. The essential question addressed by the doctrine is the validity of the contract — the unavoidability of the contract — because the main objective of a contract is to generate legally binding commitments; i.e. to implement obligations that can be made enforceable by the judicial and administrative bodies of the State.

Pursuing this theme, the question of contract formation is essential to determine if the parties had the ability to commit themselves in an arrangement, to assess if the contract really reflects the free will of the parties, and if mutual commitments are in accordance with the legal framework. In the Civil-Law framework, laws are supposed to primarily organize relationship among people in order to avoid negative externalities and to ensure public order. Therefore, contractual arrangements can be made only where law does not specifically apply. To guarantee that within these limited conditions, contracts really reflect the free will of the parties, civil legal doctrine is much concerned with the process through which mutual consents are expressed. The formality of the procedure is supposed to guarantee that neither of the parties accepts commitments against his free will. Lastly, the capability of the parties to commit themselves is carefully examined. Since contracts will be ex-post enforced as they are written (by limiting the capacity of the judge to interpret them), the capability of
the parties to actually enforce their commitments has to be checked ex-ante. Indeed, the contracting
capabilities of certain individuals is restricted either because of their situation (mental disorder,
youth, or even indebtedness) on the grounds of protection against themselves, or because they are
not allowed to commit third parties (their family, their company, etc.).

Equity makes reference to the Christian notion of commutative justice. To be valid, any type of
exchange has to be "fair" in the sense that it shall not generate illegitimate enrichment. Contracts are
not supposed to modify the distribution of wealth that existed ex-ante between the parties (see
Ghestin 2000). This holds closely to the moral philosophy of both Aristotle and Thomas of Aquina
according to which the sole legitimate source of welfare is labor. Market exchange is considered as
a practical way of reallocating the fruits of labor among members of society, and exchanges that
result in the obtainment of rents by one member of the society is considered as immoral (and
implicitly inefficient). Consequently, judges assess the fairness of the terms of the exchange. In case
of conflict, they analyze the contract conditions: does the agreement result from a process in which
one of the parties was able to obtain conditions (especially price) far superior to those obtainable
from any other fair third party? The judge has therefore to intervene if errors, cheating or even
violence has occurred during the negotiation and acceptance of the arrangement. While control of
the conditions of contract formation also exist in an Anglo-Saxon legal framework, the requirement
for conformity of contracts to the principles of social justice is a particular specificity of Roman-
Germanic legal systems. In addition to the analysis of the conditions of contract formation, French
judges also assess if there is equivalence between the inputs from each of the parties.

- First, it is essential to note that this notion applies only to disequilibra existing at the beginning
  of the contract (lésion), but not to disequilibra that arising ex-post because unpredicted events
  have occurred (imprévision). Put another way, if an ex-ante disequilibrium exists because one of
  the parties was able to exercise an influence on the other or because one of the parties benefited
  from private information, the contract can be considered as void (or alternately as opening a right
to compensation in favor of the disadvantaged party). However, if a contract that was signed in
  certain market conditions results in unfair conditions of exchanges following a significant
  modification of the environment that was unforeseeable ex-ante for both parties, then it still
  remains valid.

- Second, the notion of equivalence is obviously very difficult to assess for a judge because in
  practice he is required to determine what is a "fair" price. There are obvious difficulties when
  goods or services are scarce and specific: "market prices" cannot be applied since there are
  probably no markets for such goods. In practice, the judge tries to assess what is the actual
  meaning of "fair" price or "fair" conditions of exchanges in the whole set of a specific situation.
  There is therefore a complex set of laws describing the minimal contractual conditions in case of
  ship rescue (L 29/04/1906), provision of seeds or fertilizers (L 8/07/1907 and L 10/03/1937),
  financial loans (L 18/12/1966), etc. There is also a wide set of laws describing "exorbitant
  provisions" (clauses abusives; especially L 10/01/1978). The principal aim of these laws are to
  protect the weaker party in all "non-negotiated" contracts, typically for contracts a householder
  (implicitly) signs when he buys goods or a service. These contracts are qualified as "joining
  contracts" (contrats d'adhésion) and focus especially on the rules applying to liability, guaranty
  of ex-post quality, etc. Generally, they are codified in a document called "general sales
  conditions" that is supposed to be available to every customer, and that is usually non-
  negotiable. The "general sales conditions" are precisely the quasi-contract that is heavily
  regulated to guarantee fair exchange conditions to consumers.

- The third category of cases in which equity matters in contract governance refers to the
  "advantages that are unjustly derived from a situation". These cases have to be contrasted with
  situations in which advantages are deliberately and unfairly accrued arising from opportunistic
  behavior. In this instance, there is an unjustified transfer of wealth between the two parties. For
  example, those members of a family employed in a commercial activity without remuneration, or
  if an agent in a company enables the owner to considerably increase the value of its stocks. In

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both cases, a French judge will consider that the effort made by one of the parties opens rights to compensation because what was actually done by one of the party for the benefit of the other exceeded the obligations initially existing between the parties.

**Efficiency at the Heart of the US Legal Reasoning... and Economics**

By contrast, it is clear that the legal perception concerning contracts is quite different in Common Law tradition. It would obviously be erroneous to argue that moral considerations do not matter in this legal system... just as it would be wrong to consider that efficiency is not taken into account in Civil Law doctrine⁴. However, it is evident that Common Law practices, especially as regards the US, focus on quite different questions when it comes to the matter of contract. Contract is considered as a basis of social relationship in Common Law doctrine and legislative and judicial powers are not "naturally" allowed to interfere in contractual relationships. Such powers are considered as support in facilitating contracting, not as a superior social overriding structure that would be entitled to determine what would be preferable for both parties, with a restrictive contractual practice. Consequently, legal thought focuses on the expression of the free will of the principals (to ensure that they agree on mutual commitments), on the impact of these commitments on their individual wealth (while negative externalities can obviously matter), on the current state of their mutual interest (rather than on their past agreements). In fine, what really matters in Common Law tradition is the current mutual interest of contractors. If they agree on any kind of re-interpretation or re-negotiation of contractual arrangements, judges should ratify these agreements, because they must favor the implementation of the most efficient solution. This is obviously in line with the philosophy of enlightenment, which considers society as the convergence of free individuals endowed with irremovable fundamental rights. Each citizen is the most able to know how to use (and even to void) these rights. Consequently, neither the State, nor any third party is entitled to assess in the place of free contractors whether they are right or wrong to contract or to transact as they do. Contractors are supposed to be rational. That apparently unfavorable contracts are concluded may be ascribed to some aspect which is not visible to an observing third party. Even if it is considered that not all contractors are efficient decision makers, it can be argued that the reallocation of economic resources resulting from an unequal contract leads to a more efficient distribution, because valuable resources go to the brightest decision maker, resulting in better uses. The combination of competition and responsibility is consistent with the fact that human beings benefit from fundamental inviolate rights, and guarantee the most efficient use of resources.

The efficiency perspective is essential in North American legal theory, both because it fits in with the philosophy of liberalism forming the base of the social contract on this continent, and because it is a pragmatic way to solve theoretical debates. This perspective is obviously one of the causes of the strong cross-fertilization between the economics of contracts and legal thought and is an explanation for the heavily influenced of economics on US legal practice and legal categories. (In addition to the fact that, since World War II, the greatest number of economists, and probably the most active in terms of scientific publication, has been that of the researchers that have been trained or work in the US.)

However, the American influence on economic thought relating to legal categories (whether of contract, liability rules or legal procedures) is also due to the particular role of theory in the Common Law system. As pointed out by Hatzis (2000), because the Common Law leaves many questions open and does not state ex-ante what is legal or not, because the law in action results from the decentralized interpretation of basic principles by judges, legal uncertainty is potentially wide. Common Law therefore requires theoretical debates to enlighten and uniformize judges' decisions. In addition to the focus of Common Law and economic thought respectively on the question of efficiency, this is probably one of the major reasons for both disciplines mutually influencing each other. Economics also provides legal thinking with a consistent method to analyze the consequences of legal practice. Theoreticians can predict the reaction of a population of rational agents to a legal
rule, and assess the attainment of an equilibrium that is efficient. The contributions by Coase 1960, Becker & Stigler 1974, or Posner 1986 typically illustrate this. Obviously economics can be (and is) contested as being an element for judges’ decisions (Barnett 1999), but beyond doubt economic categories have had an influence over the last thirty years. Conversely, legal cases and practice provide economics with categories that impact upon the way problems are analyzed. Since economics have been mainly mobilized to interpret cases and categories raised by US legal practice, these categories have become common ground for economists. Damages or liability rules are good examples.

It could well be asked why the relationship between economics and Civil Law categories and problems is not stronger. This is largely because in the Civil Law framework, the uniformization of practice and applied legal thinking has traditionally occurred through doctrinal debates. Indeed many of the debates that occurring in the US over the last forty years have already existed for decades in Civil Law countries. Civil codes evolved under the influence of legal practice and practical problems raised by the evolution of the social order. For instance, liability rules evolved rapidly after the industrial revolution, with the introduction of the liability without fault category (responsabilité sans faute) aimed at ensuring financial compensation in favor of the victim of an accident due to the use of equipment made mandatory by a contract; typically the use of a machine-tool linked to an employment contract (see Jamin 2000).

This said, it must be remembered that many doctrinal debates in Civil Law countries do not escape the logic of economics. For instance, Ghézin in France had a strong influence over doctrinal evolutions in favor of incomplete contracting, as in long term distribution contracts between oil companies and retailers in which the providers fixed prices unilaterally. Ghézin demonstrated that an unilateral mechanism of price determination could be upheld because of the advantages in terms of ability to adapt to changing market prices, while avoiding costly renegotiations, as long as market power was not exercised by petroleum products providers (either because of competition from alternative providers or because of control by the antitrust authorities). While law researchers such as Ghézin do not often refer to economic thinking, their reasoning parallels that of economics. Mackay is a good example of a legal scholars who explicitly links economic reasoning to Civil Code doctrinal debates.

Thus, in that codified law does not escape from economics reasoning, it is wholly relevant to perform an economic analysis of Civil Law doctrines. First, this is a good approach to a critical assessment of prevalent Civil Law doctrine with a view to suggesting potential improvement of codes and practice. Second, it constitutes an appropriate method for advancing the evolution of economic analysis of contracts. Indeed, Civil Codes and associated practice can reveal problems and solutions that are relevant for the economic analysis of co-ordination in general.

Put another way, while the economic analysis of contract is much influenced by Anglo-Saxon categories and practice, the use of economic reasoning to analyze contractual problems is a potentially promising method to enrich doctrinal debates concerned with the evolution of Civil Codes.

**WHAT CAN BE LEARNT FROM THE ECONOMICS OF CONTRACTS**

At the outset, it is essential to remark that despite the strong influence of the legal framework on the theories of contracts, these theories were neither developed primarily to deal with legal problems nor to contribute to legal thought. Economists develop contractual theories to get a better understanding either of market co-ordination (Incentive Theory) or of organizational co-ordination (Transaction Costs Theory and Incomplete Contract Theory). Indeed, economists are essentially interested in developing theoretical tools to analyze the functioning of economic systems composed of markets
and organizations. Present-day markets are very different from the walrasian markets — i.e. systems able to display prices and to centralize all the resulting bids from the supply and the demand in order to fix price of equilibrium; see Walras (1874) — because they are decentralized and rely on bilateral contracts. Organizations result from the establishment of specific incomplete contracts which implement a hierarchical link between two parties (Coase 1937, Williamson 1975). Studying contractual relationships — the causes and effects of alternative contracting practices — was an effective method for economists to achieve a better understanding of the real functioning of our economies. However, by deepening the analysis of contractual practices, economists have been able to demonstrate the usefulness of economics in the analysis of contractual relationships and their legal implications. Many types of contractual relationship — e.g.: labor contract, vertical restrictions, sub-contracting, long term contracting, etc. — have been submitted to contract theory analysis both to renew an insight into the manifold problems of industrial organizations (labor economics, organizational economics, etc.), and also to explore further the economic analysis of contracts.

We will try to establish here that some results drawn from the economic analysis of contracts could be useful in enlightening some doctrinal problems in Civil Law. In addition to the fact that economic reasoning can demonstrate in certain circumstances the efficiency of alternative legal doctrines, it is important to note that we are today in a context in which the combination of globalization of the economy, of acceleration in technical change, of the increasing intangibility in production call for an evolution in Civil Law. In certain circumstances, this law is neither well adapted to current conditions, nor able to sustain to competition by alternative legal frameworks. It seems important therefore there be an acceptance of the economic aspect, in that it also influences the evolution of these alternative frameworks.

On the lines of the preceding section, my demonstration will focus on three examples which do not attempt to be exhaustive. My main objective is to indicate the usefulness and the richness of economic reasoning through the presentation of three topics which seem relevant for the legal analysis of contract in the context of Civil Law. First, in the economic analysis of contract, contracts are above all commitments that enable parties to limit future risks and therefore incite them to "invest" into a relationship that would not occur otherwise. The central question is therefore to make those commitments credible. Second, economic thought insists on the idea that it is quite difficult, and sometime impossible, to formulate complete contracts. Moreover, complete contracts can cause a result exactly opposite to that anticipated. Flexible contracts may therefore be considered as favoring more robust commitments than those in a complete contract. Third, contractual standards prescribed by the law can be considered both from the perspective of reducing transactions costs — since they limit the scope of negotiation of the contracting parties (and additionally their chances of making mistakes) — and from the perspective of increasing those costs — since the general solutions implemented are poorly adapted to the specific co-ordination requirements of the contracting parties. This in turn leads to consideration of the complementarities existing between the private, specific and informal institutions, and the public, general and formal legal framework.

Contracts as commitments

In the absence of uncertainty, contracts would serve no purpose. Economics of contracts as a whole is based on the fact that contracts are commitments aimed at solving problems generated by uncertainty. There are two types of uncertainties in an economic exchange. First, the precise features of the goods or services exchanged are unknown by (at least one of) the parties. In the absence of a mechanism providing the economic agents with complete and free information on the features of the goods or services transacted there will be risks of error or fraud. Second, since most exchanges do not occur instantaneously, the incentives for both parties evolve between the time they reach agreement and the time the transaction is completed.
Since agents are self interested and rational — even if it might occur that their rationality has limits, and that they sometimes behave in an altruistic manner — uncertainty generates potential mistrust between the contracting partners. Each economic agent may fear to be a victim of the opportunistic behavior of the other not delivering \textit{ex-post} what was specified \textit{ex-ante}. And this can result in unequal incentives. Two parties who attempt to maximise their own advantage at the expense of the other in completing an exchange will either not enter into the exchange, or will fail to "invest" at the optimal level. Thus, economic agents who doubt the other will therefore decide to limit their risks by reducing their investment and efforts. This is a rational response to uncertainty: agents diversify their portfolio of risks and consequently limit their "investment" in each transaction.

Two types of remedies to this problem of incentives raised by uncertainty can be imagined: institutional and contractual. Economists point out that the institutional solution cannot be complete and unique, since that would entail the existence of perfect institutions. Such theoretical institutions would enable perfect transparent information between the parties and also systematically suppress opportunistic behavior. In short, this would suppose an ability to measure everything, a capacity to observe any transaction and the means to penalize each instance of untoward behavior. This presupposes two important assumptions. Firstly, the formulation of a perfect institutional framework: completely informed, with totally rational and benevolent designers or a selection process systematically eliminating inefficient institutional elements. Secondly, the supposition that such an institutional framework would have a minimum cost. Where institution intervention is costly, the social cost of any marginal deviation should be less than the expenses involved to prevent it. Clearly, it is economically inefficient to forbid all deviant practices, and there will be many situations in which institutions cannot solve co-ordination problems. It therefore follows that the only definite solution for co-ordination problems arising from uncertainty is a contractual one. In that context, contracts are commitments aimed at guaranteeing the reciprocal input of each party within the transaction. By credibly assuring the other party of the nature and the value of the input into the transactional process, each of the parties incites the other to efficiently "invest" into the transaction, making for a positive return on the "investment".

On this aspect, economics highlights the "verification" constraint. The credibility of a contract is heavily dependent upon the means of enforcement by the parties. Whereas a contract is usually a bilateral commitment, the guarantee of its enforcement in the last resort is almost always ensured by the intervention of a third party. Without this third party — that can be a judge, a private arbitrator, or the institutional framework – contracts would need to be completely self-enforceable, ensuring both parties of the possibility to invoke a guarantee which makes preferable continuation of performance as opposed to breach. Such a guarantee is logically inconsistent in situations in which non-performance is more profitable as, for example, when the contracting parties are in a zero-sum or "winner-takes-all" game. A third party is therefore essential to ensure that the parties observe their commitments, even when enforcement of an initial commitment is against the interest of at least one of the contracting parties. If it is assumed that a third party is essential for the enforcement of contractual commitments, it must also be assumed that this third party has limitations in his capability. This is the consequence of the imperfection of the institutional environment (see above). The third party ("judge") who is responsible for guaranteeing contract enforcement in last resort is the symbolic representation of the institutional framework. It may be supposed that he may be constrained by a limited capability to verify (or observe or measure) certain variables which are relevant for the transacting parties. These variables therefore cannot reasonably form part of the contract. It would be meaningless to evoke such variables because the judge would be unable to verify \textit{ex-post} if the parties had actually observed their performance. Through the concept of verification the economics of contracts indicate the impact of the institutional environment — more precisely, the enforcement mechanisms — on contract formation. This concept leads to two general conclusions.

First, it can stated that contract formation depends upon the institutional framework which is adopted. More precisely: constructive, efficient contracts are those which provide for continuing supervision by the parties. As reported by Brousseau & Fares [2000] and by Fares [2000], the
Incomplete Contract Theory can largely be interpreted in this perspective. In order to guarantee that the contracting parties will efficiently "invest" in a transaction where significant variables cannot be predefined, the optimal contract will incorporate renegotiation terms that will incite at least one of the parties to optimally invest because he will be able *ex-post* to adjust the "level" of exchange (i.e. the effective terms of the exchange) in the light of the current situation taking into account the investments of the two parties. One of the parties could however be the victim of this ability to adjust the level of exchange. As a protection, a default option guaranteeing a minimum level of exchange needs to be implemented. If well designed, this default option should incite optimal investment. Default options are, however, dependent on the capability of the applicable institutional framework to enforce them. Indeed, where judges are unable to prevent renegotiation — open or concealed — of the default option the contracting parties will not invest optimally. Renegotiation of the default option ruins the credibility of the contract. A party will not optimally invest *ex-ante* if it is recognized that the default option may be renegotiated *ex-post*. Preventing renegotiation of the default option is crucial, whilst very difficult to attain. And to do so the enforcing authority must have access to the details of the transaction. This is indeed the only way to ensure that the default option can be enforced. It is therefore clear that where the judge is prevented from observing (verifying) what is really happening the ability of the injured party to implement the optimal default option will be bounded; i.e. the option that should incite the parties to "optimally" invest in the non-contracted aspects of the transaction would be un-implementable.

Second, leading on from the above, is the question of the institutional framework. In other terms, the ability of the parties to implement an efficient default option is dependent on two criteria of the judge responsible for contract enforcement in last resort: his attitude towards renegotiation and his supervision capability.

- An judge who authorizes renegotiation of the default option — on the grounds that the parties have agreed to renegotiate and should therefore be allowed to renegotiate fully including the default option — destroys the credibility of such an option. It is therefore important that the parties contract under a jurisdiction which prevents renegotiation of the default option. When a choice is possible, a judge under a Civil Law regime should be preferred as opposed to an Anglo-Saxon jurisdiction. Parties can also prefer to designate independent arbitrators versed in Civil Law. Obviously the assurance of *ex-ante* optimal incentives has to be balanced with the ability to efficiently adapt to a given *ex-post* situation.

- A judge empowered to enter into the details of the transaction would favor the implementation of a default option, which would lead to optimal level of investment by the parties. A more codified jurisdiction should therefore be preferred to a Common Law regime. Contractors may also choose to have recourse to independent specialized arbitrators if they consider that they would be more appropriate than public ones. In a sense, this is what happens when arbitration is chosen as the way to solve disputes. Specialized bodies such as industry federations may also perform arbitration.

Thus the extent of the credibility of contractual commitments is dependent on the supervision capability offered by the institutional framework agreed. However, this capability will always be partly manipulatable by the parties. Indeed, contractors can choose (to a certain extent) the type of institution that legislates their agreement in last resort.

**Flexibility as a Guarantee**

Whereas enforcement by a third party may in certain instances be unavoidable, it is not necessarily efficient. The process of enforcement (public or private), whilst enabling the benefit of an external coercion to oblige the recalcitrant party to honor his commitments, can be inefficient. Dispute resolution is costly, takes time (because inquiries and assessments have to be made), and can fail to achieve an equitable result (because circumstances prevent the judge from fully ascertaining the
situation and thus preclude his ability to make any decision or to arrive at a correct decision). Given these "enforcement failures" (see Williamson 1975, 1985) it may be preferable to implement contracts that are (to a certain extent) self-enforcing. Both parties will prefer to perform the contract rather than to breach it. A major conclusion emanating from economic literature over the last twenty years is the importance, in that respect, of contractual incompleteness.

If it is assumed that the scope of forecasting by contracting parties is limited — to foresee all the solutions to a complex problem is costly; see Simon (1947) — and also that they face radical uncertainty — some of the problems that they will face in the future cannot be imagined ex-ante; see Knight (1921) —, then it must be conceded that they cannot set-up ex-ante contracts that will precisely describe the optimal actions to be taken in all future states of their particular situations. Additionally they cannot reasonably restrict their future freedom of action, because there will be a high probability that such ex-ante restriction of their ex-post freedom of action will prevent their subsequently making optimal adjustments. Extremely detailed, inflexible contracts tend to create situations in which at least one party will be incited ex-post to breach: he will prefer to pay damages rather than perform the contract. This would not be a problem if damages assessed by adjudicating institutions were consistently perfectly computed and victims of breach fully compensated. Since courts, arbitrators and other adjudicating bodies are human institutions, necessarily with imperfections, it follows that perfect assessment of damages occurs only in rare instances. In certain cases such as sunk investment or sunk transfer (e.g., a transfer of know-how to the other party) damages do not fully compensate the victim because the situation created cannot be reversed. Overly detailed, inflexible contracts cannot therefore be considered as offering efficient protection to the parties involved in a transaction. Because they can anticipate that the contract might be breached in the future, contracting parties will not optimally "invest" ex ante. This is why, to be efficient, a contract has to be flexible in certain respects. Both parties should be allowed to revise ex-post their commitments in order to adjust to new situations as they unfold (see Goldberg & Erickson 1987, Crocker & Masten 1991).

If initial commitments are susceptible to future revision, little purpose is served in attempting to draft rigorously complete contracts. Contracts need to be understood as being the vehicle for framing future ex-post renegotiations in order to minimize ex-ante contracting costs (Coase 1937) together with ex-post enforcement and decision costs (Williamson 1985, Hart & Moore 1988, Aghion, Dewatripont & Rey 1994). This is put into effect with allocation of decision rights to the parties, functionally equivalent to implementation of what is usually termed authority and renegotiation mechanisms (see Brousseau 1993). In each case, the parties agree ex-ante to ex-post follow the steps laid down in a decision mechanism which can be unilateral or bilateral. Both mechanisms rely on the implementation of an authority/subordination principle. The sole difference is the way decision rights are allocated. The optimal choice depends upon the allocation of cognitive capacities and information between the two parties. Unilateral decision avoids duplication of effort but can be inefficient in the situation where the two parties have disparate decision-making or information capabilities, and where the most correct decision requires concertation of those disparate capabilities. Otherwise stated, the optimal allocation of decision rights is dependent on the trade off between decision and maladaptation costs.

The above two sections reinforce the idea that contracts should above all be understood as the structure for solving problems raised by uncertainties as to the quality of the goods to be exchanged and future situations which will arise. Contracts need to set out credible obligations which incite both parties to optimally "invest" in the transaction process. This calls for a judicious mix of flexibility and rigidity. Contractual obligations have to be flexible in order to incite the parties to ex-post honor their undertakings, sure in the knowledge that they will be able to adapt them as unanticipated situations arise. But at the same time the obligations need to be rigid in order to guarantee a minimum amount of exchange that will protect the investments of (at least one of) the parties.

Concurrently, as noted before, the contracting capabilities of the parties are significantly conditioned by the attitude and the capabilities of the enforcement institutions. Optimally they should authorize
ex-post renegotiations and contractual incompleteness, while forbidding renegotiation of the default option. It is clear that the achievement of this dual objective is by no means evident, due to the difficulty in separating out the default option provisions distinctly from the overall contract provisions. By widely allowing renegotiation US Law and courts preclude the incorporation of efficient default options, in contrast with French Law and courts which do not empower a sufficient level of ex-post adjustment by severely limiting renegotiation and contractual incompleteness.

**Contractual Standards**

In his synthesis of Law and Economics literature on the regulation of contractual practices, Schwartz (2000) identifies five main domains of possible state intervention: enforcement vocabulary, interpretation rules, default rules, contract settlement procedures. He then argues that courts and legislature ought to be considered as two "levels" of State intervention and that an analysis of the scope and relevancy of State intervention in these various areas should take into account the type of public body providing these facilities. According to Schwartz, the main finding in the literature is that State intervention should be as light as possible and should prefer ex-post intervention at court level as against ex-ante intervention at the legislative level. Indeed legislatures create rules that are necessarily general and abstract, calling for the ex-post intervention of courts in order to interpret those rules. Second, general rules can be inappropriate to specific situations, generating maladaptation costs\(^6\). Third, State intervention is justifiable if and only if instrumental in creating obvious benefits such as reduced transaction costs, solution of externality problems, long-term sustainability of competition, etc.

According to Schwartz, only four sub-fields can have an impact in practice on these types of proven benefits: Enforcement has definitively to be provided by public institutions both because a State solely can dispense legitimate violence and also because decentralized enforcement without a central court of ultimate appeal would degenerate into conflicts, social disorder and inefficiencies (because of more imperfect enforcement). Making available vocabulary — or a measuring system in the North-Barzel analytical framework (North 1990, Barzel, 1989) — to facilitate the writing of contracts and avoid misunderstanding between contracting parties is also a function that can be efficiently performed by a central body, because there are gains to be had from a single standardized interface. However, Schwartz reasons that the providing of interpretations should remain decentralized to enable a fine adaptation to the local specificities of each situation. Default rules can be provided by the State, but only for those default rules aimed at forcing information disclosure leading to the increase of communal and social welfare. The purpose is to prohibit the exploitation of information asymmetries that would generate negative results for both parties. Fourth, State intervention in the contracting process is also considered as legitimate when it aims to reduce fraud and to avoid the exercise of monopoly power generated by the contract itself (lock-in effect). Thus Law and Economic literature concludes that providing interpretation, supplying the parties with default rules which have objectives other than that of solving specific information asymmetry problems (e.g. arriving at a fair compromise or solution of co-ordination failures), or regulating contracting processes to favor the emergence of efficient or fair solutions should not be exercised by the State because of the risks of inefficient performance.

These conclusions correspond very closely with those of the recent developments of New-Institutional Economics (e.g. Brousseau & Fares 2000). Inter-individual co-ordination is extremely personalized. Reliance on a general solution mechanism — i.e. standardized contractual provisions and the surveillance of generic bodies such as courts — leads to maladaptation costs. Nonetheless, these general solutions, with their specific co-ordination rules and supervision procedures, enable contracting parties to benefit from economies of scale, scope and expertise as regards transaction costs. Also, the parties concerned can have the reassurance that these general rules with their enforcement provisions will be effective, in that they have been formulated by specialists and which will have been progressively updated. In practice contracting parties rely both on general solutions
provided by the applicable institutional framework and specific solutions formulated at bilateral level having regard to the best trade-off between maladaptation and transactions costs. From recent applied and theoretical literature on contracting practice it appears that the terms of this trade-off are not exclusively determined by the features of the transaction, on the one hand, and the characteristics of the general institutions of the society, on the other. In addition to public and governmental institutions (that are imposed), and the bilateral contract (specifically formulated), economic agents can create collective rules and governance mechanisms aimed at solving problems that are specific to a particular population (such as an industry, a certain business community, etc.). The resulting private institutions — typically a body incorporating standardization and certification committees, or an industry federation regulating the practices of its members, or a business community with a declared deontology, etc. — enables more precise trade-off between maladaptation and transactions costs: the parties are provided with "ready to use" coordination solutions that are less general and abstract than those of the public and governmental institutions. An efficient institutional framework is therefore an appropriate mix of public and private institutions.

It is to be noted additionally that private institutions are able to emerge and evolve at a quicker pace than public institutions (see Brousseau 2000). In a dynamic context, this is an essential way to achieve greater efficiency.

Lastly, one of the essential advantages of the collective solutions provided by private institutions is that they are non-mandatory: economic agents are free to apply them or not. This is an effective means of circumventing maladaptation costs incurred by the formulation at collective level of mandatory generic solutions.

Thus the propensity of Civil Law to provide contractual standards over a wide range is called into question. In order to protect weak parties this Law has many standard contracts – e.g. housing rental contracts — together with standards and mandatory contractual provisions. Moreover, private dispute resolution mechanisms and individual standards are not considered legitimate ways for the resolution of co-ordination problems. They can be provisional or temporary, but public opinion and administrations in Civil Law countries frequently adjudge that the most legitimate way to solve collective problems is through public institutions because the state will assure the strength viability and neutrality (benevolence) of the solutions implemented. Maladaptation costs as well as flexibility constraints are therefore not taken into consideration.

**CONCLUSION : CIVIL LAW AND ECONOMIC REASONING**

In this paper, I argue that economic reasoning in regard to contracts can stimulate of the evolution of doctrinal debates in Civil Law countries. Whereas Anglo-Saxon liberal ideology and the US institutional framework undoubtedly have a major influence on economics as a whole and economics of contract in particular, economics nevertheless underlines the inescapable fact that contracts are essential to overcome problems resulting from uncertainty in a world of imperfect institutions (otherwise there would be no reason for contracts to exist). And also, contracts need to be incomplete and partly non-renegotiable. Incomplete contracting is an effective method for achieving efficiency and for ensuring performance where future events are either (too) costly to forecast or impossible to foresee. Non-renegotiable default options are the sole means to guarantee to the parties a minimum level of return on their "investment" in the transaction. The Civil Code should therefore evolve to integrate the complex requirement for both flexibility and rigidity in contracting practices. The notion of incomplete contracts should be more explicitly and widely recognized as should be the identification of default options and their non-renegotiability. It is true, however, that the high propensity of Civil Law court to enforce specific performance is a factor that enables contracting parties to ensure the imposition of default options: in this respect Civil Law doctrine is in harmony with economic thought.
Another important conclusion that can be drawn from what has been developed above relates to the institutional design. Civil Law tends to not recognize the usefulness of private institutions. Since private institutions are partly informal – and therefore uncodified — and relate to private order, they are at best ignored by the doctrine. But there is also a strong school of thought that rejects the principle of private order — for instance the *lex mercatoria* — because it would be the expression of private interests as opposed to the public Law, which derives from the collective interest as well as superior moral principles. Economic thought considers that the design of efficient collective rules and astute enforcement of contracts (which need to be flexible, with non-renegotiable default options) make for the solution of manifold coordination problems at an "intermediary" level as regards the scope of public and collective bodies and the scope of inter-individual arrangements. Non-mandatory standards and collective rules designed at industry or regional level, in addition to alternative dispute resolution mechanisms — administrative non-jurisdictional entities (such as regulatory commissions arbitration tribunals) — should also be more explicitly recognized both by the doctrine and by the positive Law. They form a useful complement to the general public rules (contract and liability laws) and courts. The guiding philosophy should be to regulate the resulting composite framework, not to contest or ignore it. Whilst the adoption of non-State rules and the development of private enforcement agencies can be justified by the quest for increased efficiency, they also risk being subverted for the exercise of monopolistic power. Public institutions should therefore be involved in the strengthening of certain non-State standards and enforcement institutions — for instance by recognizing them as participating in a collective effort for enhancing the efficiency of co-ordination, by recognizing the significance of their assessments and decisions, etc. — because this will help to avoid duplication of effort and guarantee that efforts will be made by the most appropriate (efficient) bodies. However at the same time, public institutions should control these private arrangements to suppress collusion and rent capture. Indeed, the coasian enthusiasm for the efficiency of private institutions relies on the idea that competition among institutions precludes the capture of rents (in the longer term). Public institutions therefore have the remit to maintain the viability of the competitive process and to sanction private institutions which run counter.

It must be stressed that Civil Law doctrine is not based solely on philosophical and moral principles. Efficiency considerations have systematically influenced the construction of the doctrine over the centuries. Consequently, the existing doctrine and practices should be more deeply investigated to obtain a fuller understanding of their underlying economic rationality; and this could well have an impact on economic thought. Three examples in illustration.

As described above, the Civil Code prescribes extremely detailed, elaborate constraints regarding both contract formation and the contractual equilibrium between the parties. This is because equity considerations — in the sense of the Aristotelian-Christian moral of commutative justice — have a profound influence on Civil legal doctrine. In that context, rather than considering efficiency and fairness as being contradictory, it can be reasoned that fairness and equity impact favorably on efficiency. If a contract is considered fair and equitable by the signatories (because a third party and a procedure guarantee a fair and equitable result in the last resort), it will become more legitimate for both parties. Therefore, the propensity not to honor commitments should decrease. While this is only an insight, the impact of Civil Law doctrine (about fair contracting) upon the beliefs of economic agents, and therefore on their propensity to behave opportunistically should be investigate. The fact that there is a far greater incidence of judicial disputes in the US than in France, for instance, may not be not proof, but is at least a good indication, that the equity aspect is an important element in the legitimacy of contractual commitments and is a significant factor in deciding their enforcement.

Second, it is clear that in Civil Law the preference is for *ex-ante* prevention as opposed to *ex-post* compensation for damages. The existence of a variety of mandatory contractual standards together with the *a priori* exclusion of many types of arrangement is due to a preference for avoidance, to the greatest possible extent, of *ex-post* complex conflict resolution and also for more firm control of non-reversible situations. There is clearly a trade off between the maladaptation costs arising from
multiple restrictions on the freedom to contract as against the private and social costs caused by inefficient contracting, compounded by the restricted rationality (or lack of information) of the parties. It is certain that there are many instances where the trade-off is in favor of prevention. This should be better documented: for instance by comparing, case by case, the application of US Law with the outcome under French Law.

Third, and in the same vein, the trade-off between maladaptation costs generated by standard, non-customized rules and the transaction costs induced by specific bilateral arrangements should also be analyzed in greater detail. Again, a comparison between France and the US should enable researchers to better understand the factors favoring the implementation of public mandatory contractual standards and the areas in which they would generate inefficiencies. Such comparative Law and Economics would serve to promote the evolution of both the Civil Code and Common Law in achieving enhanced efficiency.
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NOTES

1. Useful comments were provided by the members of the workshop « Contracts and Institutions », GENI, Universities of Paris 1 and Paris X, especially Camille Chasserant, Bruno Chaves, Pierre Garrouste and M’hadd Fares. I thank the participants in this workshop. Usual caveats apply.

2. The conclusion must not be drawn from this example that the US legal framework is the only one permitting economic analysis of contractual practice. The ADR model demonstrates that practices under alternative legal frameworks may also be reflected. However, the contrast between the two models is a reasonable proof of the influence of a legal framework on theoreticians in the way they think a “decontextualized” theory.

Most typically, the two models highlight the extent to which respective judges examine transaction details. It is argued here that an Anglo-Saxon judge cannot be considered less rational than a French one, but it is nonetheless true that he does not seek to concentrate on transaction details for “at will” contracts that are self-enforcing, i.e., where the two parties need to agree ex-post on the way in which the contract will be performed. Judges do not intervene in the enforcement of “at will” contracts, but prefer to authorize renegotiation between the parties.

2. It needs to be made clear, however, that incomplete contracting is not totally impossible under French Law. The legal doctrine recognizes that in certain circumstances — as in labor agreements — implementation of an authority/subordination principle is unavoidable. The Civil Code is nevertheless reluctant to authorize incomplete contracting — especially in the case of price agreements, and the majority of contracts have to be as complete as possible. This is linked with the necessity to ensure equity in contractual relationships (see the following subsection).

3. Commutative Justice needs to be contrasted with Distributive Justice, which determines the attribution of gain between economic agents. Further, various norms of distributive justice exist (from Pareto to Rawls). In a sense, US legal doctrine also refers to a norm of justice that is essentially distributive and heavily influenced by efficiency — Paretian — considerations. Ethical considerations are therefore present in US legal doctrine, but since the norm of justice is different from that prevalent in Europe, the effect is slightly different.

4. Comparison between Civil Law doctrine and Common Law Theory is difficult in that there are many open questions within the two legal frameworks. At the risk of over simplification solely the dominant doctrine and theory of the two legal systems are discussed.

5. Since the default option formulated ex-ante is based on the probability of various situations foreseeable at that point, the later real situation ex-post is generally not optimal. This explains the acceptance of renegotiation of the default option ex-post, even by the party whose investments are protected by the default option.

6. Maladaptation costs make reference to rules that are inappropriate to specific situations or that are insufficiently precise. Such costs could be considered as referring to different categories of transaction costs; for the purposes of this paper it is assumed that they are in a single category. In fact, in both cases enforcement of the rule leads to sub-optimal results (or efficiency losses). Non enforcement of the rule leads to the generation of decision costs. Maladaptation costs signify a solution established ex ante which is not conducive to efficient ex-post modification, thus leading to efficiency losses or the requirement for decision, as against ex ante negotiation costs borne by the parties in respect of co-ordination solutions that will be efficient ex post.